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March 7, 2001

David Waddell, Executive Secretary  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37243

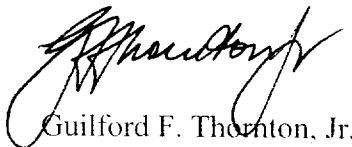
RE: Tennessee Regulatory Authority Proposed Amendments to  
Rules 1220-4-2-.01 through .42  
Docket No. 00-00873

Dear Mr. Waddell:

On behalf of BellSouth Advertising and Publishing Corporation, I am enclosing with this letter supplemental comments in the above referenced docket.

Should you have any questions or require anything further at this time, please do not hesitate to contact me.

Sincerely,



Guilford F. Thornton, Jr.

GFT/lb

Enclosure

BEFORE THE TENNESSEE REGULATORY AUTHORITY

IN RE: TENNESSEE REGULATORY AUTHORITY PROPOSED AMENDMENTS TO  
RULES 1220-4-2-.01 THROUGH .42

DOCKET NO. 00-00873

**BELLSOUTH ADVERTISING & PUBLISHING CORPORATION'S  
FINAL COMMENTS REGARDING TENNESSEE REGULATORY AUTHORITY  
PROPOSED RULE 1220-4-2-.09 (1) THROUGH (9)**

**I. INTRODUCTION**

Pursuant to the September 29, 2000 Notice of Rulemaking and subsequent procedural orders published by the Tennessee Regulatory Authority (“TRA”), BellSouth Advertising & Publishing Corporation (“BAPCO”) respectfully submits its final comments to the referenced Proposed Rules of the Tennessee Regulatory Authority.

On January 10, 2001, BAPCO submitted preliminary comments on the TRA’s Proposed Amendments to Rules 1220-4-2-.01 through .42. BAPCO participated in the first of three Workshops conducted by the TRA Staff concerning the Proposed Rules. BAPCO offered and agreed in this Workshop to submit language relating to certain of the Proposed Rules reflecting the comments of, and proposed changes by, BAPCO, those participating and the Staff.

**II. PROPOSED RULE 1220-4-2.09 (9)**

BAPCO’s most significant concerns relate to the newly proposed subsection (9) of Rules 1220-4-2-.09 (the “Proposed Cover Rule”). In its preliminary comments and at Workshop I, BAPCO requested that the TRA voluntarily withdraw the Proposed Cover Rule, or voluntarily stay its rulemaking with respect to that rule, until a final decision was rendered by the Court of Appeals of Tennessee in a consolidated appeal of two TRA orders entered in 1998. Like the

Proposed Cover Rule, those two TRA orders required BAPCO to advertise without charge the commercial logo and name of “competitive local service providers” on the covers of its Tennessee telephone directories. Soon after the orders were entered by the TRA, the Court of Appeals granted BAPCO a stay of those orders pending resolution of the appeal.

In the instant rulemaking proceeding, BAPCO sought the withdrawal or stay of the Proposed Cover Rule on the ground that it suffered from the same jurisdictional, statutory, and constitutional infirmities as the TRA’s two 1998 orders, was subject to the Court’s stay and was likely to be invalidated by the ruling of the Tennessee Court of Appeals in the event BAPCO prevailed on appeal. Those legal infirmities, which are set forth in the briefs filed and arguments made before the Tennessee Court of Appeals and in BAPCO’s preliminary comments to the TRA, include the following:

1. The TRA lacks statutory authority to adopt a Rule requiring BAPCO, a non-utility, to advertise on its directory covers the commercial logos and names of unrelated local exchange carriers.
2. The TRA lacks statutory authority over BAPCO and the branding and design of its directory covers.
3. The Proposed Cover Rule violates constitutional provisions respecting freedom of speech.
4. The Proposed Cover Rule is a confiscatory taking in violation of the Tennessee and Federal Constitutions.
5. The Proposed Cover Rule violates state and federal trademark law and promotes marketplace confusion.

On February 16, 2001, the Court of Appeals of Tennessee, in BellSouth Advertising & Publishing Corporation v. Tennessee Regulatory Authority, Nos. M1998-00987-COA-R12-CV & M1998-01012-COA-R12-CV (Tenn. Ct. App. Feb. 16, 2001), reversed the orders of the TRA

and confirmed the validity of BAPCO's arguments. (A copy of the Court's decision is attached hereto as Exhibit "A" and will hereinafter be referred to as the "Opinion"). The Court held:

Because we find that neither state nor federal law allows the TRA to compel BAPCO to brand its White Pages *cover* with the name and commercial logo of "competing telecommunications service providers" in competition with BST, and because we further find, as articulated by Judge Koch in his separate concurring opinion, that such order imposes "forced speech" upon BAPCO in violation of the First Amendment of the Constitution of the United States, both the AT&T case and the Nextlink case are reversed.

Opinion, at 20 (emphasis in original).

The Court of Appeals explained that the real question before it was *not* the procedural mechanism (i.e., rulemaking vs. contested case proceeding) used by the TRA to decide the issue, "but rather whether or not TRA had jurisdiction to compel BAPCO against its wishes" to display the name and commercial logo of competing local service providers on the cover of its "White Pages" directory. The Court concluded "that neither federal nor state law provides the [TRA] with such jurisdiction." *Id.* at 11.

The Court, in reaching this decision, cited the United States Supreme Court's decision in AT&T Corp. v. Iowa Utilities, Bd., 525 U.S. 366 (1999) and found that BAPCO's "White Pages" directory cover is among items that do not meet the statutory definition of 'network element.'" Opinion at 12 (emphasis added). The Court also concluded that the branding of "White Pages" directory covers "is not an essential public service, subject to regulation by the TRA." *Id.* at 14.

The Court also held that requiring BAPCO to advertise the name and commercial logo of unrelated local service providers on the cover of its directories imposes "forced speech" in violation of the First Amendment of the United States Constitution. *Id.* at 20. The author of the Court's opinion, Judge Cain, concurred in Section VI of Judge Koch's concurring opinion

entitled “Constitutional Limitations on the TRA’s Authority to Compel Commercial Speech.” *Id.* at 16; Concurring Opinion of Judge Koch, at 9.

Thus, the majority agreed that “BAPCO and [BST] have a constitutionally protected interest in not being forced to use their own resources, property, or funds to promote the financial interests of their competitors.” Concurring Opinion of Judge Koch, at 11.

Having resolved the appeal on other dispositive grounds, the Court chose not address the state and federal trademark issues or the constitutional question of confiscatory taking in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and in violation of Article 1 Section 8 of the Constitution of Tennessee. The Court, however, did nothing diminish the merit of those arguments, which still apply to the directory cover issues implicated in the instant rulemaking proceeding.

For all the above reasons and the decision of the Court of Appeals, as described above and attached, BAPCO submits that the TRA must reject the Proposed Directory Cover Rule

### **III. PROPOSED RULE 1220-4-2-.09 (1) THROUGH (8)**

In addition to the preliminary comments filed by BAPCO, which are incorporated herein by reference, BAPCO submits the following comments and proposed wording for the subsections of Proposed Rule 1220-4-2-.09 as set forth below.

(1) The following language reflects the comments of the staff, the industry and BAPCO, as expressed in the discussions in Workshop I and is submitted to replace that in the proposed rules:

Telephone directories shall be published regularly, in periods not to exceed fifteen (15) months unless otherwise authorized by the Authority, and shall contain at a minimum the name, address and telephone number of all customers, except public telephones and those customers who have informed the Local Telecommunications Service Provider to not list their information.

The language submitted above is taken from the existing rule with a clarification suggested at Workshop I adding specificity to the term, “regularly.” BAPCO believes that the above wording is more appropriate for two reasons.

First, directories can, and periodically must, vary from a strictly annual publishing cycle. Issues such as the introduction of new area codes, changes in extended area service, changes in printing cycles and combining or splitting of directories can each cause a directory to vary from an annual publishing cycle. Most such changes are only a matter of days or weeks, but they are common enough that the Proposed Rule must reflect this reality. Use of the term “regularly” in the existing rule is more accurate and has not resulted in any confusion or issue in the many years it has been in place. If the word “annual” were substituted as proposed, the TRA could be required to amend the rule each time a change in any publication date for a directory is made.

Second, as directories begin to be published in electronic media, which is already the case in some areas, they can be updated more often, rendering the “annual” concept outdated. Such developments could even reduce the need for yearly publication of some directories.

At Workshop I, the staff expressed concern that the word “regularly” in the existing rule could need clarification. Accordingly and as proposed in the Workshop, we have inserted the clarifying phrase, “in periods not to exceed fifteen (15) months unless otherwise authorized by the Authority.”

(2) The following language reflects the comments of the staff, the industry and BAPCO, as expressed in the discussions in Workshop I and is submitted to replace that in the proposed rules:

All Local Telecommunications Service Providers shall make available, free of charge to their customers, white page telephone directory(ies) for the local calling area where the customer is located. Directories for areas outside the local calling area shall be made available to the customer for a reasonable cost.

The language submitted makes clear that local calling area directories are to be “made available” to customers, rather than “provided,” as would be required under the Proposed Rule. For cost and environmental reasons, it is most appropriate and consistent with customer preferences for directories outside the community where a customer lives to be made available upon request. Indeed, many customers do not desire to receive directories at all, much less for the entire local calling area prescribed. For these reasons and given the lack of differing comments at Workshop I by the industry or the staff, BAPCO suggests that the above be substituted for the Proposed Rule.

(3) The following language reflects the comments of the staff, the industry and BAPCO, as expressed in the discussions in Workshop I and is submitted to replace that in the proposed rules:

In the event of an error in the listed number of any customer and provided the number is in service, the Local Telecommunications Service Provider shall intercept all calls to the listed number for a reasonable period of time not to exceed the life of the directory containing the error, provided existing central office equipment will permit. If the error is due to the Local Telecommunications Service Provider’s fault, there shall be no charge to the customer for the intercept. In the event of an error or omission in the listed name of a customer, such customer’s correct name and telephone number shall be in the files of the information or intercept operators and the correct number furnished the calling party either upon request or interception.

As proposed, the rule confuses two types of errors that each requires significantly different resolution. BAPCO submits that the approach contained in the existing rule better reflects the remedy required.

Intercepts generally provide no benefit when an error occurs in a listed name and could compound the inconvenience to the customer since the customer’s assigned number would need

to be changed to accommodate the intercept. Instead, directory assistance should be provided with the corrected listing, as set out in the existing rule and as suggested above.

Intercepts are appropriate for a reasonable period of time, as the existing rule states, when errors occur in listed numbers. As suggested at Workshop I, the phrase “not to exceed the life of the directory containing the error” has been added to clarify further the intended meaning. Accordingly, BAPCO suggests that the above be substituted for the Proposed Rule.

(4) The following language reflects the comments of the staff, the industry and BAPCO, as expressed in the discussions in Workshop I and is submitted to replace that in the proposed rules:

The Authority’s toll-free telephone number and Internet address shall be listed on the inside cover or the first page of the directory. Telecommunications Service Providers shall not charge the Authority for the listing of the above information.

This wording would allow for publication of the Authority’s information on either the inside front cover or the first page of a directory as suggested by BAPCO and Sprint representatives at Workshop I. The inside cover of directories in Tennessee is often sold as advertising for interested businesses, while the first page and subsequent section is reserved for, and most often used by consumers to find, general information, such as that called for in the proposed rule. BAPCO recommends that the TRA not engage in a potential taking of valuable advertising space and suggests that the rule permit publishing of the TRA’s information in either location.

(5) The following language reflects the comments of the staff, the industry and BAPCO, as expressed in the discussions in Workshop I and is submitted to replace that in the proposed rules:

Telecommunications Service Providers shall provide the Authority, upon request and without charge, at least one (1) copy of its directories at the time of publication.

Under the existing rule, the TRA has requested directories and replacements as needed. BAPCO recommends that the existing practice remain in place. As directories become available in electronic formats, such as CD-ROM, for use on computers or servers, the TRA may prefer these alternatives to the burden of storing and managing all print directories. The language set out above allows for this alternative, while allowing the TRA to request copies as needed. This language also makes clear that the TRA would receive requested copies without charge.

(6) The following language reflects the comments of the staff, the industry and BAPCO, as expressed in the discussions in Workshop I and is submitted to replace that in the proposed rules:

The directory shall contain instructions concerning placing local and long distance calls, calls to repair, calls with regard to billing questions as well as information services, and the mailing address of the Local Telecommunications Service Provider. Publication shall be subject to applicable advertising charges for each Local Telecommunications Provider.

The language submitted above is as contained in the Proposed Rule. In addition, it adds and makes clear that a directory publisher may charge Telecommunications Service Providers for publishing such information on their behalf. Since most directories are not published by Telecommunications Service Providers, this addition would avoid any potential confusion over the cost of publishing such information. BAPCO believes that this wording reflects the views

expressed by it, the industry and the Staff at Workshop I and submits it as an addition to the Proposed Rule.

(7) The following language reflects the comments of the staff, the industry and BAPCO, as expressed in the discussions in Workshop I and is submitted to replace that in the proposed rules:

The area included in the directory along with the month and year of the issuance of or the intended period of use for the directory shall appear on the cover of the directory. Information pertaining to emergency calls such as for the police and fire department shall appear conspicuously in the front section of the directory.

BAPCO has long published the phrase “Use Until...” followed by a date on the covers of its directories and has found this phrase to be more useful to the consumer, particularly since users do not always discard old directories immediately upon receipt of a new issue. The suggested change above would accommodate this helpful practice without requiring all publishers to change their own practices. BAPCO requests that its submitted wording be substituted for that in the Proposed Rule.

(8) Neither the industry nor BAPCO had any comments or objections in Workshop I related to this provision as it appears in the proposed rules.

#### **IV. CONCLUSION**

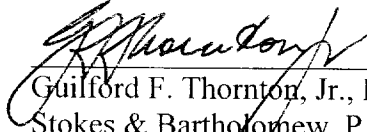
For the reasons set forth by the Court of Appeals of Tennessee in BellSouth Advertising & Publishing Corporation v. Tennessee Regulatory Authority, Nos. M1998-00987-COA-R12-CV & M1998-01012-COA-R12-CV (Tenn. Ct. App. Feb. 16, 2001), and by BAPCO in its briefs and arguments before the Court of Appeals and in its preliminary comments to the TRA,

BAPCO respectfully submits that the Proposed Cover Rule would be an invalid rule if implemented and must be rejected by the TRA.

BAPCO further submits, for the reasons stated in its preliminary comments, its statements at Workshop I and as provided herein, that Proposed Rule 1220-4-2-.09 (1) through (8) should be amended and revised to reflect the language submitted above.

Accordingly, BAPCO respectfully moves the TRA to withdraw or reject the Proposed Cover Rule and to amend and revise Proposed Rule 1220-4-2-.09 (1) through (8), as set forth above.

Respectfully submitted this 7th day of March, 2001.

  
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